NO. 46869-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

BRIAN ALAN OLESON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 14-1-00266-0

BRIEF OF RESPONDENT

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SERVICE		
	Jodi R. Backlund Po Box 6490 Olympia, WA 98507-6490 Email: backlundmistry@gmail.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED August 17, 2015, Port Orchard, WA _____ **Original e-filed at the Court of Appeals; Copy to counsel listed at left.** **Office ID # 91103 kcpa@co.kitsap.wa.us**

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2. Whether the trial court properly declined to instruct the jury that whether the defendant had the *immediate* ability to take actual possession was a relevant factor to consider in weighing whether Oleson had Dominion and control where the "immediate" language is generally only appropriate in use-of-firearm cases?

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5. Whether the trial court properly gave the reasonable doubt instruction mandated by the Washington Supreme Court?

6. Whether, with the exception of the expert witness fund contribution, which should be stricken, this court should decline to consider Oleson's LFO claims for the first time on appeal? [PARTIAL CONCESSION OF ERROR]

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Brian Alan Oleson was charged by amended information filed in Kitsap County Superior Court with three counts of second-degree unlawful possession of a firearm, and possession of methamphetamine. CP 42. The jury found Oleson guilty of possession of methamphetamine and guilty of the first two counts of unlawful possession of a firearm. CP 51-52.

B. FACTS[1]

The West Sound Narcotics Task Force (WestNET) executed a search warrant on December 31, 2013, at a house at 2412 Seabeck Holly Road NE in Kitsap County, at 6:12 a.m. 2RP 152, 155-56. Oleson and Susan Christopher were at the house when they arrived. 2RP 224.

[1] The trial reports consist of Volumes I-III and a fourth volume titled "Closing Arguments Verdict." The latter volume is paginated sequentially with Volumes I-III and will be referred to herein as "4RP." The sentencing report is separately paginated and will be referred to as "RP (sent.)."

When asked if he knew why he was in custody, Oleson responded, "Yes, because of the guns." 2RP 228. Oleson stated that had he lived in the house for two years, and knew he was not supposed to be around firearms because he was a convicted felon. 2RP 228, 255, 256. He stated that Christopher was his girlfriend. 2RP 228. He said that he and Christopher were in the salvage business and were in the process of obtaining appropriate licenses for that. 2RP 256. Oleson also admitted to having used methamphetamine for 18 or 19 years, including the previous evening in the house. 2RP 257.

The house was very cluttered. 2RP 182. When they first walked in there was a mirror on a small table in front of the couch. 2RP 183. The mirror in the family room was in plain sight. 2RP 184. In the dinette area there was a plate on the desk with glass tube and a razor on it. 2RP 184, 185; Exh 12, 30. All these items were associated with drug use. 2RP 184.

In the master bedroom was a rifle, which was a Savage .22. 2RP 186; Exh 23. It was just leaning up against a pile of clothing. 2RP 178. It was very visible. 2RP 179. It was not loaded, but there were a couple of magazines for it in the dresser to the left of the bedroom door. 2RP 190, 211.

There was also a Beretta 9 mm semiautomatic pistol in the master

bedroom. 2RP 186, 191, 210. It was on top of the red suitcase. 2RP 190; Exh 25, 26, 27. On top of the suitcase was some clothing. 2RP 190. On top of that was a fanny pack. 2RP 190. On the fanny pack was a magazine holding rounds for the gun. 2RP 190. The barrel of the pistol was visible sticking out of it. 2RP 190. There were also earplugs and extra rounds in the fanny pack. 2RP 195, 211. Near the bed was a plastic box several hundred rounds of various kinds of ammunition. 2RP 233, 356. All the guns were tested and determined to be functional. 2RP 299-304.

Also in the room was mail addressed to Oleson. 2RP 192; Exh 43. There was also a casino card in the bedroom with Oleson's name on it. 2RP 194; Exh 46.

Also in the master bedroom were various items typically used as drug paraphernalia: needles, razor blades, Q-tips, packaging materials, dime bags, a digital scale, etc. 2RP 259, 283. In one of the drawers was a hypodermic needle kit. In another was a silver tray with a cut straw and a dusting of white crystalline material on it. 2RP 284. There were two dime baggies of a white crystalline substance. 2RP 293. One marked "B" and the other "HT." 2RP 293. In street lingo, "B" means "ball," short for "eightball" or an eighth of an ounce of methamphetamine, which is about 3.5 grams. 2RP 293. The bag marked "B" weighed 3.9 grams including

the packaging. 2RP 294. "T" means "teener" or a sixteenth of an ounce, about 1.7 grams. 2RP 293. "HT" likely meant a half-teener. 2RP 293. The second bag weighed 1.4 grams with the packaging. 2RP 294.

On the bed was a metal case containing a digital scale, again with a dusting of white crystalline powder on it, a small spoon, and some plastic baggies. 2RP 284. There was a pocket ledger with figures and initials in it. 2RP 285. On the dresser next to the door was a letter addressed to Christopher. 2RP 285. In one of the drawers was an envelope with "Sue and Brian" written on it. 2RP 285. There was a hand-written letter inside that said "To Susan and Brian." 2RP 285-86; Exh 40A & 41A. There were loose needles in one top drawer and a syringe kit in the other. 2RP 286-87. In the top left drawer was a loaded magazine that appeared to fit the Beretta. 2RP 287. On the floor next to the bed was an 18-inch sign with Old English lettering that said "Susan and Brian" on it. 2RP 287; Exh 42.

There was also mail from Lucky Dog Casino addressed to Oleson at the address in the dinette area. 3RP 369. In it was Buffet coupon inside valid on December 31, 2013. 3RP 369-70. Also a player's card with Oleson's name dated 12-31-2013. On the desk were four glass pipes, one cracked, and a couple plastic baggies. 3RP 373. The pipes had burnt residue in them. 3RP 373. One was made out of an airline bottle. 3RP

374; Exh 30. One of the bags had a powdery residue in it. 3RP 375.

There was a plate on the desk 3RP 375; Exh 13. On the plate was a pile of white powdery substance and a razor blade. 3RP 377; Exh 13. The substance subsequently was tested by the crime lab and determined to be 1.46 grams of methamphetamine. 3RP 442, 446.

A clerk from the Department of Licensing testified that Oleson on May 8, 2013, had changed his address to 2412 Seabeck Holly Road. 3RP 417; Exh. 22.

III. ARGUMENT

A. EVIDENCE THAT OLESON'S GIRLFRIEND OWNED THE HOUSE, THAT HE HAD LIVED THERE FOR TWO YEARS, THAT HE WAS SLEEPING IN THE HOUSE WHEN THE POLICE ARRIVED, THAT HE HAD CONSUMED METHAMPHETAMINE IN THE HOUSE THE NIGHT BEFORE, AND THAT HE WAS AWARE OF THE GUNS' PRESENCE WAS SUFFICIENT FOR THE JURY TO CONCLUDE THAT OLESON HAD DOMINION AND CONTROL BOTH OVER THE PREMISES AND THE GUNS AND DRUGS FOUND IN PLAIN VIEW IN THE HOUSE.

Oleson argues that the evidence was insufficient to establish that Oleson had constructive possession of the guns or methamphetamine in his house. This claim is without merit because evidence that Oleson's girlfriend owned the house, that he had lived there for two years, that he

was sleeping in the house when the police arrived, that he had consumed methamphetamine in the house the night before, and that he was aware of the guns' presence was sufficient for the jury to conclude that Oleson had dominion and control both over the premises and the guns and drugs found in plain view in the house.

It is a basic principle of law that the finder of fact at trial is the sole and exclusive judge of the evidence, and if the verdict is supported by substantial competent evidence it shall be upheld. *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010 (1969). The appellate court is not free to weigh the evidence and decide whether it preponderates in favor of the verdict, even if the appellate court might have resolved the issues of fact differently. *Basford*, 76 Wn.2d at 530-31.

In reviewing the sufficiency of the evidence, an appellate court examines whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crime have been proven beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v.*

Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Finally, the appellate courts must defer to the trier of fact on issues involving "conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

Possession can be actual or constructive. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969); *State v. George*, 146 Wn. App. 906, 920, 193 P.3d 693 (2008). A person has constructive possession when he has dominion and control over the item. *State v. Jones*, 146 Wn.2d 328, 333, 45 P .3d 1062 (2002). Whether a person had dominion and control over an item depends on the totality of the circumstances. *State v. Jeffrey*, 11 Wn. App. 222, 227, 889 P.2d 956 (1995).

A person's dominion and control over a premises allows the trier of fact to infer that the person also has dominion and control over items in the premises. *State v. Summers*, 107 Wn. App. 373, 389, 28 P.3d 780 (2001), *remanded for reconsideration on other grounds*, 145 Wn.2d 1015 (2002). Dominion and control of premises can be shared; it need not be exclusive to establish constructive possession of controlled substances found thereon. *State v. Cote*, 123 Wn. App. 546, 549, 96 P.3d 410 (2004).

When determining whether the evidence is sufficient, "the cumulative effect of a number of factors may be a strong indication of

constructive possession." *State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977). That is, the Court looks at the totality of the situation to determine if there is substantial evidence tending to establish circumstances from which the jury could reasonably infer that the defendant had dominion and control of the contraband, i.e., was in constructive possession of them. *Partin*, 88 Wn.2d at 906.

Here the evidence showed that Oleson informed the Department of Licensing that he had lived at Christopher's house for seven months prior to his arrest. 3RP 417; Exh. 22. Notably, his history with DOL suggests he was quite scrupulous about notifying them of his address changes, having reported 12 changes of address since 1999. Moreover, he told the police that he had been living there for two years. 2RP 228, 255. He never mentioned living anywhere else. 3RP 355. These facts alone support a finding of constructive possession. *Summers*, 107 Wn. App. at 389 ("Summers admits he lived in the basement, which meant he had dominion and control over the premises. This fact alone would allow the jury to infer that Summers had constructive possession of the firearm and defeat his claim of insufficient evidence").

Further, Oleson was at the home when the police arrived at 6:00 a.m., he had received mail addressed there, and had other items bearing his name there. 2RP 199, 194, 285, 287, 3RP 369-72, 399-402. Exh 40A,

41A, 42, 43, 46. He also clearly knew the guns were there, and that he should not have them. 2RP 228, 256. He additionally admitted to having consumed methamphetamine there the previous evening, and that Christopher was his girlfriend, and that they were in business together. 2RP 228, 256, 257.

Moreover, the guns,[2] their magazines and ammunition were plainly visible to anyone in the house. 2RP 188-90, 211, 287, 3RP 356. *See* Exh. 20, 23, 24, 25, 26,[3] 27, 33, 36. Similarly, there was an abundance of drug paraphernalia and, in addition to the pile of methamphetamine tested positive by the crime lab, 2RP 289-90, 3RP 442, 377-78, *see* Exh. 30, there was a significant number of packages also containing what appeared to be drugs throughout the house, much of it in plain view. 2RP 184, 185, 283-85, 292-94, 3RP 373, 385-86 Exh. 12, 30, 31A, 32, 35, 38

Considered as whole, there was more than enough evidence for a jury to determine that the house was Oleson's primary residence that he shared with his girlfriend. As noted, that alone was sufficient evidence for a jury to infer dominion and control of the drugs and guns in it. Here, however there was further evidence form the obviousness of the

[2] The guns for which he was convicted were in plain sight. The gun of which Oleson was acquitted of possessing was located in a safe. 2RP 231-32. Notably, Oleson had told the police that he did not have the combination to the safe. 2RP 229. Nor were there any materials pertaining to Oleson in the safe. 2RP 230.

[3] Exhibits 25 and 26 show the location of the red the suitcase on which they found the fanny pack containing the Beretta with its barrel sticking out of it. 2RP 186, 190-191.

contraband items and Oleson's own statements that he possessed the items. *See State v. Gonzales*, 46 Wn. App. 388, 403, 731 P.2d 1101 (1986) (evidence implied both dominion and control over the premises and knowledge of the presence of controlled substances amounting to constructive possession where defendant and wife were primarily in control of the premises and the variety and placement in plain view of drugs and drug paraphernalia indicated knowledge of their presence in the home).

Oleson relies primarily on the Supreme Court's holding in *State v. Davis*, 182 Wn.2d 222, 340 P.3d 820 (2014).[4] *Davis* breaks no new ground. It merely applies existing precedent to the facts of that case. The facts there, however, bear little resemblance to those in Oleson's case.

The defendants in *Davis* were charged with firearms offenses and with rendering criminal assistance to Maurice Clemmons, the shooter in the 2009 Lakewood Police murders. After the shootings, Clemmons made his way to defendant Eddie Lee Davis's home, where told Davis he had been shot while killing four police officers and requested a ride to the Auburn home of codefendant Letrecia Nelson. *Davis*, 182 Wn.2d at 225.

There, Clemmons banged on the window and then knocked on the

[4] As Oleson correctly notes, the holding of the Court with regard to the possession issue is found in the dissent. *See Davis*, 182 Wn.2d at 233-36 (Stephens, J., dissenting).

door, saying he had been shot. Nelson let Clemmons inside, along with Davis. Clemmons told Nelson he had killed four police officers, been shot in the process, and stolen one officer's gun. Clemmons asked for and was given fresh clothing and help treating his gunshot wound. Nelson put some clothes and the stolen gun in a shopping bag that was left on a counter. Just before leaving, Clemmons asked where the gun was and Davis replied that it was in the bag on the counter and gave the bag to Clemmons. *Davis*, 182 Wn.2d at 225. Davis and Nelson were convicted of first degree rendering criminal assistance and possession of a stolen firearm. Davis was also convicted of second degree unlawful possession of a firearm.

On appeal, Davis and Nelson argued that the State did not present sufficient evidence to support the jury's determination that they possessed the gun. *Davis*, 182 Wn.2d at 226. The Supreme Court agreed with the defendants:

> In this case, no evidence showed that Davis or Nelson exercised sufficient control over the gun. The Court of Appeals reasoned that they constructively possessed the gun by placing it in a shopping bag and by carrying the bag containing the gun from the kitchen to the living room and handing it to Clemmons. The lead opinion echoes this mistaken understanding of constructive possession and conflates actual possession with constructive possession. The situation here more closely resembles the lack of dominion and control we addressed in *Callahan* because neither Davis nor Nelson asserted any interest in the gun. Instead, they briefly handled the item

for Clemmons, the true possessor of the gun.

> ... Clemmons arrived at Nelson's home in an atmosphere of chaos—covered in blood, pounding on doors and windows, making demands for assistance, and admitting to killing four armed police officers. The evidence at trial revealed Clemmons's tendency to be "in control of his family members" and others, along with his reputation of being "intimidating." The question of whether Davis and Nelson exercised dominion and control over the gun must be considered in this context.

Davis, 182 Wn.2d at 235. In so concluding, the Court discussed its holding in *Partin*:

> *Partin* provides an example of sufficient indicia of premises control. In *Partin* the defendant regularly parked his motorcycle on the premises, received phone calls there, stored personal documents and effects on the premises, and acted as vice president of a club operating on the premises. 88 Wn.2d at 907. These facts showed that the defendant exercised dominion and control over the premises and therefore constructively possessed drugs found on the premises.

Davis, 182 Wn. 2d at 234.

The facts of this case more closely resemble *Partin* and the other cases where dominion and control of the premises was sufficient to prove dominion and control of the contraband. Here, unlike in *Davis*, there was no evidence that in an "atmosphere of chaos" an "intimidating" third party brought the drugs and guns briefly into the home where Oleson lived. There was no evidence, as in *Davis*, that the contraband plainly belonged to a third party. As noted *Davis* merely applied long-standing precedent to the facts of that particular case. That same long-standing precedent also

shows that the evidence in Oleson's case was sufficient for the jury to find dominion and control of the house and therefore, of the drugs and guns located in plain view inside it.

Oleson also argues that he did not constructively possess the premises because he did not own the house, and because Christopher shared the house with at least one other person. As noted, however, regardless of whether he owned the house, Oleson held it out to the Department of Licensing as his residence.

Further, there is no evidence whatsoever that Christopher and Oleson shared the house with anyone else. Although there was evidence that when the police executed the warrant a third person was present (and released at the scene due to a lack of probable cause to detain him), there was no evidence whatsoever at trial regarding this person's relationship to the house. 3RP 356. His release suggests that there was not one.

Additionally, although there was a second bedroom in the house, there was no testimony that anyone occupied it. The sole photo of the door to the second bedroom suggests that it may have been occupied by a child or teenager. *See* Exh. 18. Nothing in the record in any way suggests that there was any third person who had greater control over the house than Oleson. Finally, even if there were, as noted previously, dominion and control does not have to be exclusive. *Cote*, 123 Wn. App. at 549.

The totality of the circumstances was sufficient for a jury to find that Oleson had dominion and control over the house. Absent any evidence, as in *Davis*, to overcome the inference that he therefore had dominion and control over its contents, the evidence was sufficient. This claim should be rejected.

B. THE TRIAL COURT PROPERLY DECLINED TO INSTRUCT THE JURY THAT WHETHER THE DEFENDANT HAD THE *IMMEDIATE* ABILITY TO TAKE ACTUAL POSSESSION WAS A RELEVANT FACTOR TO CONSIDER IN WEIGHING WHETHER OLESON HAD DOMINION AND CONTROL WHERE THE "IMMEDIATE" LANGUAGE IS GENERALLY ONLY APPROPRIATE IN USE-OF-FIREARM CASES.

Oleson next claims that the trial court erred when it declined to instruct the jury that whether the defendant had the *immediate* ability to take actual possession was a relevant factor to consider in weighing whether Oleson had dominion and control. This claim is without merit because the "immediate" language is generally only appropriate in use-of-firearm cases.

This Court reviews a trial court's decision to reject a party's jury instruction for an abuse of discretion. *State v. Howell*, 119 Wn. App. 644, 649, 79 P.3d 451 (2003). Jury instructions are sufficient as long as they permit each party to argue his or her theory of the case, are not misleading,

and, when read as a whole, properly inform the jury of the applicable law. *Id.*

Both parties proposed instructions based on WPIC 50.03, which provides a definition of possession:

> Possession means having a substance in one's custody or control. [It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance.]
>
> [Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.]
>
> [In deciding whether the defendant had dominion and control over a substance, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include [whether the defendant had the [*immediate*] ability to take actual possession of the substance,] [whether the defendant had the capacity to exclude others from possession of the substance,][and][whether the defendant had dominion and control over the premises where the substance was located]. No single one of these factors necessarily controls your decision.]

The only disagreement was whether to include the italicized term "immediate." 4RP 56-61.

In firearm possession cases, a defendant need not be able to immediately access a firearm in his possession to be convicted. *Howell*, 119 Wn. App. at 650; *accord State v. Frasquillo*, 161 Wn. App. 907, 918,

255 P.3d 813, *review denied*, 172 Wn.2d 1016 (2011). Such an instruction should be reserved for deadly weapons enhancement cases, which require immediate access. *Howell*, 119 Wn. App. at 649 (*citing State v. Johnson*, 94 Wn. App. 882, 974 P.2d 855 (1999)). Indeed, it would have been error to include the bracketed "immediate" language from WPIC 50.03 because it would have improperly added another element to the crime, which the State would have then had to prove. *State v. Willis*, 153 Wn.2d 366, 374, 103 P.3d 1213 (2005) (A jury instruction that is not objected to, establishes the law of the case). The trial court did not abuse its discretion in excluding "immediately" from the instruction.

Oleson's reliance on *Davis* is again misplaced. He selectively quotes the opinion:

> Constructive possession requires proof that the accused person has "the ability to *immediately* take actual possession of an item." Davis, 182 Wn.2d at ___ (Stephens, J. for the majority) (emphasis added)

Brief of Appellant, at 9. He takes the quote out of context. What the Court actually said was:

> While the ability to immediately take actual possession of an item *can* establish dominion and control, mere proximity to the item by itself cannot.

Davis, 182 Wn.2d at 234 (emphasis added). Moreover, *Davis* was a sufficiency case, not an instruction case. Nothing in the opinion in any way purports to change the law on constructive possession in the context

of sufficiency of the evidence claims. It would be indeed a stretch to read the case as changing the requirements for jury instructions.

Finally, nothing in the instruction as given prevented Oleson from arguing his theory of the case, which was largely that he did not have dominion and control over the premises because he did not live there. 4RP 588-89, 591-92. Indeed, the jury acquitted him of possession of the one gun that was in a safe to which he claimed not to have the combination. Given that the remaining guns and drugs were lying in plain view in his bedroom and in the kitchen, improperly requiring a finding of an ability to take immediate control of them would not have changed Oleson's argument or the outcome of the case. This claim should be rejected.

C. THE CHARGING DOCUMENT WAS CONSTITUTIONALLY SUFFICIENT WHERE IT ALLEGED ALL THE ELEMENTS OF EVERY OFFENSE CHARGED AND OLESON WAIVED ANY OTHER CLAIM THAT THE INFORMATION WAS VAGUE BY NOT SEEKING A BILL OF PARTICULARS.

Oleson next claims that the charging document was inadequate because it did not pair a specific firearm with each of the three counts of unlawful possession of a firearm. This claim, raised for the first time on appeal is without merit because the information contained every element of each offense charged; moreover the statement of probable cause

identified the three guns involved. Oleson was entitled to seek a bill of particulars if he felt he needed one, but did not, thereby waiving any vagueness claim on appeal.

An information must contain all essential elements of a crime to give the accused proper notice of the crime charged so that he can prepare an adequate defense. *State v. Williams*, 162 Wn.2d 177, 183, 170 P.3d 30 (2007); *State v. Kjorsvik*, 117 Wn.2d 93, 101, 812 P.2d 86 (1991). To satisfy this requirement, the information must allege every element of the charged offense and the facts supporting the elements. *State v. Nonog*, 169 Wn.2d 220, 226, 237 P.3d 250 (2010).

The Court distinguishes between charging documents that are constitutionally deficient and those that are merely vague. *State v. Leach*, 113 Wn.2d 679, 686-87, 782 P.2d 552 (1989). A constitutionally deficient information is subject to dismissal for failure to state an offense by omitting allegations of the essential elements constituting the offense charged. *Leach*, 113 Wn.2d at 686–87. An information that states each statutory element of a crime, but is vague as to some other matter, may be corrected under a bill of particulars. *Leach*, 113 Wn.2d at 687. A defendant may not challenge an information for vagueness on appeal if he did not request a bill of particulars at trial. *Leach*, 113 Wn.2d at 687.

When reviewing the sufficiency of an information that is

challenged for the first time on appeal, this court engages in a two-pronged analysis. *State v. Kjorsvik*, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991). First, if the information does not state all elements of the crime, the court determines whether it contains any language, or reasonable inferences, that would give the accused notice of the missing element or elements, *Kjorsvik*, 117 Wn.2d at 106. If there is some language, but it is vague, the court then considers whether the defendant has shown actual prejudice from the defect. *Kjorsvik*, 117 Wn.2d at 106.

WPIC 133.02.02 list the element of second-degree unlawful possession of a firearm:

> To convict the defendant of the crime of unlawful possession of a firearm in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about (date), the defendant [knowingly owned a firearm][or] [knowingly had a firearm in [his][her] possession or control];
>
> (2) That the defendant had previously been [convicted]... of [(name of felony other than serious offense)] [or][a felony]; and
>
> (3) That the [ownership][or][possession or control] of the firearm occurred in the State of Washington.

Here, Counts I through III each alleged:

> On or about December 31, 2013, in the County of Kitsap, State of Washington, the above-named Defendant did knowingly own, possess, or have in his or her control a firearm, after having been previously convicted of ASSAULT THIRD DEGREE; contrary to the Revised Code of Washington 9.41.040(2)(a)(i).

> (MAXIMUM PENALTY-Five (5) years imprisonment and/or a $10,000 fine pursuant to RCW 9.41.040(2)(b) and 9A.20.021(1)(e), plus restitution and assessments.)

CP 42-43. The amended information thus clearly contains all the elements of the offense. Because it contains all the elements of the offense the charging document was constitutionally sufficient.

Even if the elements were somehow considered vague, the second prong of the *Kjorsvik* test allows the court to look outside the information to determine whether the defendant suffered actual prejudice. *Kjorsvik*, 117 Wn.2d at 106. The court notes that "[i]t is possible that other circumstances of the charging process can reasonably inform the defendant in a timely manner of the nature of the charges." *Id.* In the instant case, the original information was accompanied by a statement of probable cause, which may be considered. *Kjorsvik*, 117 Wn.2d at 111. The probable cause statement clearly indicates that the charges are based on three separate firearms:

> During a search of the residence (3) firearms were located inside the home, a 9mm pistol, a .22 caliber rifle and a loaded .357 revolver. The firearms were in no way secured or otherwise controlled from access by resident Oleson.

State's Supp. CP (original information, statement of probable cause).[5]

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[5] Although not an issue raised by Oleson, the State made an election to the jury in closing:

> So let's talk about the firearms charges first.
>
> The instructions related to the elements are found in Nos. 10,

Oleson's reliance on *Russell v. United States*, 369 U.S. 749, 82 S. Ct. 1038, 8 L. Ed. 2d 240 (1962), is misplaced. As the Supreme Court noted in *Kjorsvik*, in *Russell*, the issue had been raised at trial, and therefore was subject to broad review on appeal. *Kjorsvik*, 117 Wn.2d at 107. Moreover, because that case was charged by indictment, rather than information, it was not subject to clarification by a bill of particulars, as would have been the case here. *Russell*, 369 U.S. at 770. Because the issue was not raised below, the liberal standard of *Kjorsvik* applies and has been met.[6] Because Oleson never sought a bill of particulars, he has waived any vagueness challenge to the information. This claim should be rejected.

> 11 and 12. And we can call these the "to convict" instructions.
>
> We start off with "to convict." For each of those three charges, the elements are the same, but we have three different firearms. So when talking about Count 1, I'd like you to refer to the 22-caliber Savage rifle.
>
> When talking about Count 2, I would like you to refer to the nine-millimeter Beretta.
>
> And in Count 3, the .357 Taurus. So sorry to repeat myself. I'm going to repeat that one more time. Count 1 will be the rifle; Count 2 will be the Beretta; and Count 3 will be the .357.

4RP 571-72. *See State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988) (the State must either elect the act on which it relies for each count); *see also State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

[6] Notably the dissent in *Kjorsvik*, in arguing that the post-verdict standard of review therein was inadequate, presented an argument based on *Russell* that was virtually identical to that presented by Oleson. *Kjorsvik*, 117 Wn.2d at 117 (Utter, J., dissenting). It thus appears that *Kjorsvik* rejected the standard of review Oleson would have this Court apply.

D. OLESON'S CLAIM THAT THE TRIAL PROSECUTOR ENCOURAGED THE JURY TO CONSIDER EVIDENCE NOT IN THE RECORD IS WITHOUT MERIT BECAUSE IN CONTEXT, THE PROSECUTOR WAS ACTUALLY DISCUSSING THE FACT THAT THE JURY HAD TO RELY ON THE EVIDENCE THAT WAS BEFORE THEM.

Oleson next claims that the trial prosecutor improperly encouraged the jury to consider evidence not in the record. This claim is without merit because in context, it was clear the prosecutor was actually discussing the fact that the jury had to rely on the evidence that was before them. Moreover, the trial court sustained the objection and instructed the jury to disregard it. Finally, Oleson fails to show that the purported error was prejudicial.

To prevail on a claim of prosecutorial misconduct, Oleson must show that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). First, the Court must determine that the prosecutor's conduct was improper. *Emery*, 174 Wn.2d at 759. If the prosecutor's conduct was improper, the Court must determine whether the prosecutor's improper conduct resulted in prejudice to Oleson. *Emery*, 174 Wn.2d at 757-78, 760-61. "A defendant can establish prejudice only if there is a substantial likelihood that the misconduct affected the jury's verdict." *State v. Jackson*, 150 Wn. App. 877, 883, 209 P.3d 553 (2009). Relevant here, the Court presumes the

jury followed the trial court's instructions. *State v. Anderson*, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002 (2010).

The objected-to comment must also be examined in the context of the entire arguments and evidence presented at trial. *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007), *cert. denied*, 554 U.S. 922 (2008). Here, the prosecutor began her summation by emphasizing the reasonable doubt standard. 4RP 570-71. She then proceeded to discuss the to-convict instructions for each firearm count. 4RP 571-72. She noted that there did not appear to be much doubt regarding Oleson's identity, the date of the crimes, that they occurred in Washington, or that the guns were guns. 4RP 573. She noted that the issue in the case came down to whether Oleson possessed them. 4RP 573. She then discussed the possession instruction, and applied the various factors listed in it to the trial evidence. 4RP 573-78.

The prosecutor then turned to the to-convict instruction for the methamphetamine count. 4RP 578. She again noted that the date, the defendant, the location, and that the substance was methamphetamine were not particularly in issue. 4RP 578-79. She then noted that again the issue was possession, and again went through the relevant factors and evidence. 4RP 579-81. She then summed up her argument, again

invoking the reasonable doubt standard and tying it the evidence:

> And so I'd ask you to look very carefully at the elements that I have to prove. Beyond a reasonable doubt is an important part of our system. It's an important burden. I ask you to apply it in its due place. You have substantial evidence in this case of each element, and I would ask you to convict the defendant, to find the defendant guilty of each of the three counts of unlawful possession of a firearm and the controlled substance possession. Thank you.

4RP 581-82.

In his closing, Oleson agreed that the case came down to the question of possession. 4RP 582. He then briefly summarized what "we have heard." 4RP 582-83. His argument quickly turn to "what we haven't heard," and argued: "You have no clue. That's not before you. That is a lack of evidence." 4RP 583. He attacked the officers' testimony regarding Oleson's statements:

> Unfortunately for you, the jurors, you don't know exactly what Mr. Oleson said. And that's because notes were destroyed. And even when they had the ready capability to simply push "play" on a recorder to record, excuse me, they didn't take that opportunity.
>
> So now we are left essentially with their interpretation, which by the way fits very nicely with what they're attempting to prove, of what Mr. Oleson said.

4RP 585. He criticized the State for not producing fingerprint evidence showing that Oleson had handled the drugs and guns: "Didn't bother to do it." 4RP 586. He accused the police of "cutting corners." 4RP 587. He again brought up a "lack of evidence." 4RP 588-89. He continued

with that theme and concluded:

> And there is a significant lack of evidence that creates a reasonable doubt that Brian Oleson possessed constructively anything at question here.
>
> And I would ask you to accordingly find him not guilty. Thank you.

4RP 594.

In her rebuttal, the prosecutor pointed out that while there was no evidence *where* Oleson was in the house before he was arrested, he was certainly in the house. 4RP 595. She addressed the claim that the guns were not in a common area, pointing out that there was no functional door for the master bedroom, and that Oleson and Christopher were a couple. 4RP 596-97. She then noted that even if the house was not Oleson's primary residence, the evidence certainly suggested that he had free run of it. 4RP 598. She then addressed defense evidence that had been offered regarding Oleson's address. 4RP 599. She then again pointed out evidence of Oleson's dominion and control, and how even accepting the defense evidence it still existed. 4RP 600.

She then to Oleson's repeated claims about a lack of evidence, leading up to the defense objection:

> A note regarding some of the evidence. Mr. Purves mentioned the lack of DNA, the lack of fingerprints, that officers didn't take fingerprints on the firearms.
>
> You also had the testimony that it's not a real option for them. That even if they could get fingerprints, for

instance, off of the surface – which they testified doing so off firearms is extremely difficult given the kind of surface – sending it into the crime lab is likely a moot point because they won't test. So consider whether or not that's really a meaningful lack of evidence for you. I mean, there's certainly things you don't know in this case. There's a back-story that you don't know. But that abiding –

MR. PURVES: I guess I would object.

THE COURT: Sustained.

MR. PURVES: Ask the court to instruct them to disregard.

THE COURT: The jury will disregard the comment regarding a back-story.

Proceed, Ms. Christensen.

MS. CHRISTENSEN: Thank you.

I would ask that the – either the evidence or any lack of evidence that you see, that you apply that specifically to the elements. I'm sorry to harp on the same topic. It is the specific elements in the "to convict" instruction I have to prove beyond a reasonable doubt. You have that evidence in the case before you.

I guess I'll wrap up by stating I hope that you will consider all of the evidence before you with an open mind, that you carefully consider all of the evidence that you have before you, and that you find Brian Oleson guilty of three counts of possession of a firearm and possession of a controlled substance. Thank you.

4RP 600-602.

Despite the shrill tone of Oleson's brief, in context, it is apparent that the prosecutor was not encouraging the jury to consider evidence not before them. To the contrary, she was clearly, if inartfully, trying to explain to them that Oleson was correct, there were things that had not

been explained to them, but that *the evidence before them* proved Oleson's guilt beyond a reasonable doubt. Oleson fails to show the comments were improper.

Additionally he fails to show prejudicial effect. The jury was give a standard instruction to the effect that the attorneys' comments were not evidence, it was given a specific instruction to disregard the comment, and at no point did the prosecutor suggest that there existed any evidence that they should consider or that there was evidence that supported guilt. To the contrary she noted that of course there was evidence not before them, but that the evidence actually before them supported a finding of guilt. This claim should be rejected.

E. THE TRIAL COURT PROPERLY GAVE THE REASONABLE DOUBT INSTRUCTION MANDATED BY THE WASHINGTON SUPREME COURT.

Oleson next claims that the trial court's reasonable doubt instruction was improper. However, the Washington Supreme Court has held that WPIC 4.01 is mandatory. Since the instruction given at trial followed WPIC 4.01 verbatim, this Court lacks authority to consider the present claim.

WPIC 4.01 provides:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The

> State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

Instruction 2 in this case provided:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State of Washington is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 52.

In *State v. Bennett*, 161 Wn. 2d 303, 317-18, 165 P.3d 1241 (2007), the Supreme Court mandated the use of WPIC 4.01 in all criminal

trials:

> Even if many variations of the definition of reasonable doubt meet minimal due process requirements, the presumption of innocence is simply too fundamental, too central to the core of the foundation of our justice system not to require adherence to a clear, simple, accepted, and uniform instruction. We therefore exercise our inherent supervisory power to instruct Washington trial courts not to use the Castle instruction. We have approved WPIC 4.01 and conclude that sound judicial practice requires that this instruction be given until a better instruction is approved. Trial courts are instructed to use the WPIC 4.01 instruction to inform the jury of the government's burden to prove every element of the charged crime beyond a reasonable doubt.

This Court "is bound to follow precedent established by [Washington's Supreme Court.]" *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 590, 146 P.3d 423 (2006). Because the Supreme Court has mandated the use of the instruction in question, this Court may not find error in the trial court following the Supreme Court's explicit mandate.

Moreover, even it could, Oleson fails to show error. He contends that the phrase "If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt" encouraged the jury to undertake an impermissible search for the truth. But our Supreme Court has expressly affirmed the use of this language. *Bennett*, 161 Wn.2d at 318; *see also State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

Further, Oleson's reliance on *State v. Emery*, where the prosecutor

in closing told the jury both that their "verdict should speak the truth" and to "speak the truth by holding these men accountable for what they did" is also misplaced. As this Court has explained:

> Fedorov lastly challenges the court's reasonable doubt instruction. He claims it was error to instruct the jury that "[i]f, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." Fedorov argues, "The 'belief in the truth' language encourages the jury to undertake an impermissible search for the truth." Br. of Appellant at 22.
>
> We disagree. *State v. Bennett*, 161 Wn.2d 303, 165 P.3d 1241 (2007), and *State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995), control. Fedorov relies on *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012), to challenge the "abiding belief" language. He claims this language is similar to the impermissible "speak the truth" remarks made by the State during closing. *Emery*, 174 Wn.2d at 751. Emery found the "speak the truth" argument improper because it misstated the jury's role. Here, read in context, the "belief in the truth" phrase accurately informs the jury its "job is to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Emery*, 174 Wn.2d at 760, 278 P.3d 653. The reasonable doubt instruction accurately stated the law.

State v. Fedorov, 181 Wn. App. 187, 199-200, 324 P.3d 784 (2014), *review denied*, 181 Wn. 2d 1009 (2014); *accord State v. Kinzle*, 181 Wn. App. 774, 784, 326 P.3d 870 (2014), *review denied*, 337 P.3d 325 (2014) ("We reject Kinzle's argument that the optional language impermissibly suggests that the jury's job is to "search" for the truth. The phrase "abiding belief in the truth of the charge" merely elaborates on what it means to be "satisfied beyond a reasonable doubt.").

Likewise, the Supreme Court has also rejected Oleson's argument regarding the phrase ""a doubt for which a reason can be given." In *State v. Kalebaugh*, ___ Wn.2d ___, ¶ 15, 2015 WL 4136540 (July 9, 2015), the Supreme Court recently reaffirmed that WPIC 4.01 was "the correct legal instruction on reasonable doubt." After correctly instructing the jury during preliminary remarks that reasonable doubt was "a doubt for which a reason exists," the trial judge in *Kalebaugh* paraphrased the explanation as "a doubt for which a reason *can be given*." *Id.*, at ¶ 13 (emphasis the Court's). In concluding that the error in the trial judge's comment was harmless beyond a reasonable doubt, the Court rejected any suggestion that WPIC 4.01 required the jury to articulate a reason for having a reasonable doubt or was akin to the improper "fill in the blank" argument criticized in *Emery*. *Id.*; *see also State v. Thompson*, 13 Wn. App. 1, 4-5, 533 P.2d 395 (1975) (the phrase "a doubt for which a reason exists" does not direct the jury "to assign a reason for their doubts"). This claim lacks merit and should be rejected.

F. WITH THE EXCEPTION OF THE EXPERT WITNESS FUND CONTRIBUTION, WHICH SHOULD BE STRICKEN, THIS COURT SHOULD DECLINE TO CONSIDER OLESON'S LFO CLAIMS FOR THE FIRST TIME ON APPEAL.

Oleson finally claims that the trial court erred in imposing various costs. The State concedes that the imposition of costs for the expert

witness fund should be stricken. The remaining issue, relating to whether the trial court properly determined whether Oleson had the ability to pay, is moot as to most of the costs because they are mandatory, and the Court should decline to consider the remaining item for the first time on appeal.

1. The expert witness fund contribution should be stricken.

Oleson's first claim is that the trial court erred in imposing costs for the expert witness fund. For the reasons set forth his brief, the State agrees. Oleson's conviction and sentence should be affirmed and the cause remanded to strike this provisions from the judgment.

2. This court should decline to consider Oleson's remaining LFO claims for the first time on appeal.

For the first time on appeal, Oleson challenges the court's imposition of legal financial obligations, arguing that there is insufficient evidence of his present or future ability to pay, citing *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). Three of the five legal financial obligations were mandatory and are unaffected by the decision in *Blazina*.[7] The court should decline to consider the remaining amounts, for attorney's fees and for the contribution to SIU/WestNET, because Oleson

[7] Six of the remaining seven LFOs ordered by the trial court were mandatory, and do not come within the reach of *Blazina*, which by its terms only applies to discretionary awards. *See* RCW 7.68.035(1)(a) (victim assessment); RCW 36.18.020(2)(h) (filing fee); RCW 43.43.7541 (DNA fee); RCW 69.50.430 (mandatory drug fine); RCW 43.43.690 (crime lab fee). These fees are mandatory, not discretionary. *State v. Lundy*, 176 Wn. App. 96, 102-103, 308 P.3d 755 (2013) ("For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account.").

failed to object at sentencing, despite being put on notice by this court's decision in *State v. Blazina*, 174 Wn. App. 906, 301 P.3d 492 (2013).

In its 2015 *Blazina* opinion, the Washington Supreme Court specifically held that it is not error for this Court to decline to reach the merits on a challenge to the imposition of LFOs made for the first time on appeal. *Blazina*, 182 Wn.2d at 832. "Unpreserved LFO errors do not command review as a matter of right under *Ford* and its progeny." *Blazina*, 182 Wn.2d at 833 (*citing State v. Ford*, 137 Wn.2d 472, 478, 973 P.2d 452 (1999)). The decision to review is discretionary with the reviewing court under RAP 2.5. *Blazina*, 182 Wn.2d at 835. In *State v. Duncan*, 180 Wn. App. 246, 327 P.3d 699 (2014), *review granted*, ___ Wn.2d ___ (Aug. 5, 2015), the court held that defendant's failure to object was not because the ability to pay LFOs was overlooked; rather, the defendant reasonably waived the issue, considering "the apparent and unsurprising fact that many defendants do not make an effort at sentencing to suggest to the sentencing court that they are, and will remain, unproductive" *Duncan*, 180 Wn. App. at 250, 253. *Duncan* remains good law, and reflects the policy embodied by RAP 2.5(a), a policy that encourages the efficient use of judicial resources and discourages late claims that could have been corrected with a timely objection. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988).

Here, Oleson failed to object at sentencing. Furthermore, Oleson is in a nearly identical position to the defendant in *State v. Lyle*, ___ Wn. App. ___, 2015 WL 4156773 (July 10, 2015). There, this court refused to address Lyle's LFO claim, holding that Lyle was on notice regarding waiver of *Blazina* issues. "Our decision in *Blazina*, issued before Lyle's March 14, 2014 sentencing, provided notice that the failure to object to LFOs during sentencing waives a related claim of error on appeal." *Lyle*, ___ Wn. App. at ¶ 10. Oleson was sentenced on October 17, 2014, so he too had notice, and still failed to object.[8] This court should therefore decline to review this issue.

Moreover, though Oleson now speculates that a *Blazina* inquiry would have weighed heavily against a finding of ability to pay, nowhere does the record support his contention. Oleson fails to cite to any fact pertaining to his alleged lack of assets. To the contrary, Oleson himself presented testimony from his employer that he was "missing one of my best employees." RP (sent.) 6. He further stated:

But I still want to employ him, if he can be released at

[8] Though not raised by Oleson, it follows that there is a potential claim of ineffective assistance of counsel. However, even assuming, *arguendo*, deficient performance on this issue, Oleson must further show that he was prejudiced. Just as in *Lyle*, there are no additional facts in the record in this case that would allow the court to determine whether the trial court would have imposed fewer or no LFOs if defense counsel had objected. Because Oleson must establish prejudice on the record below and the record is not sufficient for the court to determine whether there is a reasonable probability that the trial court's decision would have been different, a claim of ineffective assistance of counsel on this basis must fail. *See Lyle*, ___ Wn. App. at ¶¶ 14-15.

> some time soon. I'm hoping. Because we're missing one of our best employees. We really are. ... I looked, and it was 27 concerts we've done together and never had to tell him he done anything wrong. That's why he was being promoted. Number two is the guy below me.

RP (sent.) 8. There is therefore no obvious error on the record, the matter was not preserved for review, and the court should not consider the issue of LFOs for the first time on appeal.

IV. CONCLUSION

For the foregoing reasons, Oleson's conviction and sentence should be affirmed, and the matter remanded to strike the expert witness fund contribution.

DATED August 17, 2015.

Respectfully submitted,
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KITSAP COUNTY PROSECUTOR

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